STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. PJ09HE-63277

[redacted] o/b/o her minor child, [redacted], and Craig Sashihara, Director of the New Jersey Division on Civil Rights,

Complainants,

v.

Secaucus Board of Education,

Respondent.

Administrative Action

FINDING OF PROBABLE CAUSE

The Director of the New Jersey Division on Civil Rights (DCR), pursuant to N.J.S.A. 10:5-14 and attendant procedural regulations, hereby finds that probable cause exists to believe that an unlawful discriminatory practice has occurred in this matter.

On August 24, 2012, [redacted] filed a verified complaint with the DCR alleging that the Secaucus Board of Education unlawfully discriminated against her daughter, [redacted], based on the girl's membership in a protected class, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. In particular, Complainant alleged that because of [redacted]'s disability, Respondent excluded her from the middle school graduation ceremony, receipt of a diploma, and yearbook photos, among other things.

Respondent denied the allegations of discrimination in their entirety. It stated that Complainant received notification of all graduation activities in the same manner as all other parents. Respondent asserts that [redacted] did not receive a diploma–although one was prepared for her-because she did not participate in the graduation ceremony, and that she did take part in yearbook pictures.

The DCR investigated the allegations. The parties had an opportunity to submit evidence and make argument to DCR. Having reviewed the investigative materials and governing legal standards, the Director now finds as follows.

[redacted] (Complainant) is the parent and guardian for [redacted] Both are residents of Secaucus, Hudson County, New Jersey.[1]

Respondent is a public school district that provides educational services from pre-kindergarten through twelfth grade, including special education, to children residing in Secaucus, Hudson County, New Jersey.

[redacted] is a person with a disability. She has been diagnosed with Cri Du Chat 5P Minus Syndrome, a genetic disorder often characterized by intellectual disability and delayed development. [redacted] receives special education services from Respondent including occupational, physical, and speech therapy. [redacted] receives her educational services in a classroom dedicated to students receiving special education services. She is accompanied during the school day by a licensed practical nurse.

In accordance with the Federal Individual with Disabilities in Education Act and State special education laws, [redacted]'s educational program is detailed in an Individualized Education Program (IEP). As a general matter, an IEP is developed by a team that includes a designated case manager and others involved in planning and providing the student's educational program, including the student's parents or guardians. An IEP team meets annually to discuss the student's goals and progress, and set goals for the following year. Additional IEP team meetings may be held during the year as needed.

On February 28, 2012, an IEP meeting was held for [redacted] Members of [redacted]'s IEP team include her mother and her case manager, Jeanne Gannon (who also serves as a school

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1 Craig Sashihara is the Director of the Division on Civil Rights and has intervened as a complainant in this matter in the public interest pursuant to N.J.A.C. 13:4-2.2 (e). However, for purposes of this finding, the term "Complainant" will refer only to the mother, D.B.S.

psychologist). It was determined at the meeting that [redacted]'s placement would remain unchanged through February 28, 2013, i.e., she would remain an eighth grader for the next twelve months.

Because of [redacted]'s significantly impaired communication skills and cognitive ability, educational assessments do not follow the same guidelines as general education students. Instead, a process known as an Alternative Proficiency Assessment (APA) is used to measure progress toward achieving New Jersey's state educational standards for those students with severe disabilities who are unable to participate in the New Jersey Assessment of Skills and Knowledge. In April 2012, an APA was completed for [redacted]. Sometime later in April school officials determined, based on the APA, that [redacted] would be designated as a ninth grader. School officials did not notify Complainant of the change in her child's designation from the eighth to ninth grade. However, they notified [redacted]'s classroom teacher, Karen Marchione, of the change.

Respondent holds an eighth grade graduation ceremony at its Performing Arts Center, where students are presented with a certificate signifying their completion of middle school. Respondent also holds a dinner dance and a graduation after-party for the departing students.

On April 20, 2012, Marchione sent an email to Gannon asking whether [redacted] would be participating in the graduation ceremony. The email stated, in part, "Hi Jeanne, A question has come up about 8th [sic] graduation. Should . . . [redacted] participate?" That day, Gannon forwarded that inquiry to her supervisor, Susan Smahl, Director of Special Services. Smahl replied that same day by email asking Gannon whether [redacted]'s parents would want the child to participate in the ceremony. Smahl wrote that she and Middle School Principal Robert Daniello "thought that the families would want them to participate . . . However, I am open to suggestion - nothing is etched in stone about this . . ."

There is a sharp dispute as to what occurred next. Gannon claims that Smahl verbally instructed her that the "decision was made" to exclude [redacted] from the ceremony. In particular, Gannon certified:

> Subsequent to my April 20 email, Director Smahl had a conversation with me where she told me that she had discussed the issue of [redacted]'s participation in graduation with Principal Daniello, and that a decision was made that [redacted] would not be allowed to participate in the middle school gradation ceremony. Director Smahl did not give me a reason for their decision.

Smahl and Daniello, on the other hand, deny purposely excluding [redacted] from the graduation ceremony. Smahl stated that any child's participation is up to the parent and that she specifically directed Gannon to contact [redacted]'s parents about graduation. Smahl stated that she was "surprised" when [redacted] did not appear at the graduation ceremony.

Complainant stated that in June 2012, prior to graduation, she received a form for [redacted] with the instruction that it be completed and returned to the *high* school office. Complainant found that odd because her daughter was a middle school student. On the other hand, she knew that the middle school and high school were both housed in the same building. Still, the middle school had its own office. Confused, complainant contacted Gannon for guidance. She stated that Gannon told her she was not sure if [redacted] was going to be "SRA'd,"[2] and that she had no other information and that Complainant should call Smahl. Complainant was unable to reach Smahl but left a telephone message asking Smahl to call her back. Smahl returned her call days later on June 22, 2012, after the graduation ceremony had already taken place. Complainant described the conversation as follows:

> I asked her to clarify my daughter's status; specifically, I wanted to know whether [redacted] was promoted from 8th to 9th grade, and if so, I wanted to know why no one notifed me and why she was not included in the graduation ceremony. Ms. Smahl said, "You caught me off guard." She said that the issue of graduation was discussed with Principal Robert Daniello, and that "there was a reason, but I can't recall what it was." She said she would get back to me.

Complainant stated that she had a follow-up conversation with Smahl on June 28, 2012, which she described, in part, as follows:

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[2] Although Complainant's report of the conversation referenced the term "SRA" (an acronym for Special Review Assessment), it appears that it refers to the APA process since SRA is an assessment for older high school students.

Ms. Smahls [sic] confirmed for me that [redacted] was now, in fact, a high school student. She also said they would try to make it up to [redacted] by including her in the future in the high school graduation ceremony and prom.

Smahl presented a slightly different version of events. She acknowledged that when Complainant asked why [redacted] had not been present at the middle school graduation ceremony, she replied, "[T]o tell you the truth I'm not sure," but denied stating that the question had "caught [her] off guard." She also denied telling Complainant that [redacted]'s participation in the graduation "had been discussed" and that "there was a reason" why [redacted] had been excluded. She acknowledged stating in a follow-up conversation that she would "make it up" to [redacted]

Respondent stated that Complainant was timely notified of all graduation activities. Respondent stated that it sent multiple notifications via phone and email regarding the upcoming graduation, year book purchases, caps and gowns, and various parties and functions. For instance, Respondent produced the following email dated May 8, 2012, entitled, "MS Graduation."

> Good Evening 8th Grade Parents and Guardians: This it to inform you that the 8th grade graduation date and time have been revised to meet the deserving needs of the gradation ceremony. The 8th grade graduation will be held on Tuesday, June 19 at 6:30 p.m. in the PAC. Also, you will be e-mailed by the end of this week a detailed schedule of all June events for the 8th graders. Of course, all events will also be posted on our school's website at www.sms.sbhoe.us. Thank you and have a great evening! Rob Daniello Principal Secaucus Middles School.

Principal Daniello acknowledged that those communications were sent to all parents of eighth grade students regardless of whether the student was actually advancing to high school or not. Respondent stated that there were no personal calls or emails, but only general email announcements and automated phone messages or "robocalls."

Complainant stated that she ignored any such emails or robocalls because she believed--based on the February 2012 IEP meeting--that [redacted] would remain an eighth grade student for at least one more year. Complainant also stated that she was in regular contact with school officials though phone calls, written letters, and notes. She stated that the school never communicated with her about [redacted] by email. Smahl and Gannon confirmed that it was not Respondent's practice to communicate with parents of special education students by email. Lastly, Complainant stated that

she had a significant amount of contact with school officials during May 2012 to discuss a matter concerning the sanitary conditions in [redacted]'s classroom and [redacted]'s risk of infection. Complainant stated that at no point during those discussions did anyone mention that [redacted] went through the APA process and that they changed her grade level.

The LAD makes it unlawful for any "place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof" on the basis of disability. N.J.S.A. 10:5-12(f). A public middle school is a "place of public accommodation." N.J.S.A. 10:5-5(l).

At the conclusion of an investigation, the DCR is required to determine whether probable cause exists to credit a complainant's allegation of discrimination. Probable cause has been described under the LAD as a reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the law was violated and that the matter should proceed to hearing. Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div.1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799. A finding of probable cause is not an adjudication on the merits but merely an "initial culling-out process" in which the DCR makes a preliminary determination of whether further action is warranted. Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App. Div.1978).

Complainant alleges that Respondent made an affirmative decision to preclude [redacted] from its middle school graduation activities. [redacted]s case manager, Jeanne Gannon, certified that her supervisor, Director of Special Education Susan Smahl, told her that she and Middle School Principal Robert Daniello discussed the issue of [redacted]'s participation in gradation and decided that the child "would not be allowed to participate." Although Smahl and Daniello denied reaching any such decision (instead asserting that they assumed that Complainant did not want [redacted] to participate), the nature of Smahl's subsequent conversation with Complainant supports Gannon's version of events. Smahl admits that Complainant asked her why [redacted] did not participate in the

ceremony and that she replied, "[T]o tell you the truth I'm not sure." If a school administrator genuinely believed that a parent withheld her child from a graduation ceremony, then such a response would seen unlikely.

The timing of the events also raises concerns about Respondent's motives. The APA and its resulting change in classification that moved [redacted] to ninth grade was completed in April 2012. That significant event--a decision to advance [redacted] to high school--was not reported to Complainant until late in June 2012, a few days after the graduation ceremony at issue. The unexplained delay in reporting that information is even more troublesome in light of the significant communications that took place between Complainant and school officials in May 2012 and, to a lesser extent, in June prior to the ceremony.

Although Complainant acknowledges receiving the graduation emails and robocalls, her decision to ignore same appears justifiable. She had no reason to believe that [redacted] was eligible to be elevated from middle school to high school. To the contrary, based on her participation in the February 2012 IEP meeting, her understanding was that [redacted]'s placement would not change for the next twelve months. Daniello also acknowledged that those communications were sent to eighth grade parents regardless of whether their children were eligible for graduation. Moreover, it was Respondent's regular practice to communicate with Complainant through personal phone calls or letters, and not through email.

The governing regulation states that the Director shall issue a finding of probable cause if there is a "reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person in the belief that the [LAD] has been violated." N.J.A.C. 13:4-10.2(b). In this case, that standard is met. The investigation found that [redacted] was a student receiving special education services at Respondent's middle school when it was determined that she would be elevated to the high school. Respondent did not communicate that information to [redacted]'s mother until after the middle school graduation ceremony occurred, thereby depriving [redacted] of the opportunity to participate in the ceremony. In view of the circumstances, interviews, and

certifications, it is reasonable to suspect that Respondent deliberately withheld that information to deny [redacted] the opportunity to participate in graduation activities with other eighth grade students.

WHEREFORE, it is hereby determined and found that probable cause exists to credit the allegations of the complaint.

4-19-13
DATE

CRAIG SASHIHARA, DIRECTOR
NJ DIVISION ON CIVIL RIGHTS